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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 174 (LGS)

5 FABIO PORFIRIO LOBO,

6 Defendant.

7 -----x

8 November 9, 2016
9 5:30 p.m.

10 Before:

11 HON. LORNA G. SCHOFIELD

District Judge

12 APPEARANCES

13 PREET BHARARA

14 United States Attorney for the
Southern District of New York

15 MATTHEW J. LAROCHE

Assistant United States Attorney

16 RETURETA & WASSEM, PLLC

17 Attorneys for Defendant

18 MANUEL J. RETURETA

19 Also present: DAVID MINTZ, Spanish Language Interpreter
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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record.

4 MR. LAROCHE: Good evening, your Honor. Matt Laroche
5 for the government.

6 THE COURT: Good evening.

7 MR. RETURETA: Good evening, your Honor. Manuel
8 Retureta on behalf of Mr. Lobo, who is present.

9 THE COURT: Hello, Mr. Lobo.

10 I see we have a Spanish interpreter.

11 Let me know, Mr. Lobo, if you have any trouble
12 understanding the interpreter.

13 And, Mr. Interpreter, please let me know if you have
14 any trouble understanding or hearing Mr. Lobo.

15 So, Mr. Laroche, will you just remind me where we are?

16 MR. LAROCHE: Yes, your Honor. We were supposed to
17 have a sentencing scheduled in this matter. I think the
18 parties have some factual disagreements that are going to
19 require a Fatico hearing. With respect to that hearing, the
20 government thinks it will take about three days.

21 THE COURT: I saw that, and I couldn't believe it.

22 MR. LAROCHE: The reason for the length is we plan to
23 call at least one cooperating witness, and we expect his
24 testimony to take at least a day. There is also a significant
25 amount of recordings, both audio and video recordings, that we

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1 would want to introduce into evidence. I would say we would do
2 our best to get it done in two days. I am just trying to be
3 conservative with the time.

4 THE COURT: You might as well go to trial at that
5 point, although I know we already have a guilty plea.

6 So what is the factual issue as it impacts sentencing?

7 MR. LAROCHE: I think it's the extent of his
8 involvement. There's a couple of issues. One is the quantity
9 of drugs. The government is submitting that the quantity was
10 over 450 kilograms, which puts the base offense level at, I
11 believe, 38. There is also several enhancements that the
12 government thinks are appropriate.

13 THE COURT: Let's talk about these things one at a
14 time.

15 So quantity of drugs, I would think -- and if you
16 could just step that way a little bit, that way I can see Mr.
17 Retureta also -- would not be something that would be in
18 dispute. So what is the dispute?

19 MR. LAROCHE: I will defer to Mr. Retureta.

20 THE COURT: I will hear him.

21 MR. RETURETA: Your Honor, the dispute deals with how
22 far we carry my client's conduct with the large-scale operation
23 that he was connected to. The large-scale operation is an
24 organization known as Los Chicheros.

25 THE COURT: Can you speak right into the mic?

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1 MR. RETURETA: The large-scale operation is known as
2 Los Chicheros and there are ties, recordings, videos with my
3 client with them. It's the government's position that my
4 client is responsible for a large portion of what they were
5 doing. Our position is that he has pled guilty to specific
6 acts with them and should not be held responsible for the
7 larger portion of the Los Chicheros enterprise, which was vast
8 in time, scope and quantity.

9 THE COURT: OK.

10 MR. RETURETA: I think that kind of spreads to some of
11 the other issues in dispute, such as the firearms.

12 THE COURT: I understand.

13 I don't specifically recall the guilty plea, but I
14 presume it was very narrowly tailored and that the allocution
15 was narrowly tailored.

16 MR. RETURETA: It was, your Honor.

17 THE COURT: And that it met all of the requirements of
18 the charge.

19 So I guess my question for the government is, how can
20 you essentially expand the scope of that, or are you not trying
21 to do that?

22 MR. LAROCHE: We are not trying to expand the scope of
23 it. I think Mr. Lobo pled guilty, his allocution was
24 sufficient. He didn't have to allocute at that time to the
25 extent of the conspiracy or his involvement. That's an issue

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1 that is readily decided at a Fatico hearing.

2 THE COURT: So the enhancements that are at issue are
3 what?

4 MR. RETURETA: Your Honor, we are dealing with leader,
5 gun, direct importation, and quantity.

6 Leader role in the offense.

7 THE COURT: I understand.

8 So the idea is there would be one live witness and
9 then several recordings. What kind of recordings are we
10 talking about?

11 MR. LAROCHE: There's audio recordings of both
12 telephone calls. There's recordings of meetings. And there is
13 a video recording of a specific meeting that is particularly
14 important.

15 THE COURT: Do you have transcripts of the recordings?

16 MR. LAROCHE: Yes, we have, and we have provided them
17 in discovery. They are all in Spanish recordings.

18 THE COURT: So it seems to me -- well, let me ask Mr.
19 Retureta.

20 Obviously, you will want to cross-examine the
21 cooperator. Is there any reason not to have the testimony of
22 the cooperator, and then I don't understand Spanish, so having
23 me listen to the tapes would not be useful at all. I will
24 obviously rely on the transcripts. So if we have the
25 cooperator, cross-examination of the cooperator, and then you

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1 submit to me the transcripts, is there any reason we can't do
2 it that way so that we don't just burn a lot of time listening
3 to tapes that I can't understand?

4 MR. RETURETA: If I understand the Court correctly,
5 have the cooperator come in and testify as to what was
6 happening and just have the audios as transcripts?

7 THE COURT: Right.

8 MR. RETURETA: That's fine.

9 THE COURT: So they would be marked and put in
10 evidence. Then I would read them and consider the testimony
11 and then make a ruling.

12 MR. RETURETA: We are not here to dispute the
13 recording, the quality of the recording, what was said. So,
14 yes.

15 THE COURT: Just what is made of it. I understand.

16 Mr. Laroche, any reason we can't do that?

17 MR. LAROCHE: I think that's a fine plan, your Honor.

18 I just want to note, to be clear, we are considering
19 calling one of the agents that was involved in the case, who
20 has information relevant to the specific arrest that we think
21 the Court might want to consider. So there might actually be
22 more than one witness.

23 With respect to some of the recordings, I think that's
24 a fine plan. We would want to review it and make sure there is
25 nothing we want to present specifically, because some of it

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1 might be in context. So if we are reviewing a recording with
2 the cooperating witness, we would want to play it with him
3 here.

4 THE COURT: But I still don't want to hear it.

5 MR. LAROCHE: Understood.

6 THE COURT: You can have the cooperating witness say,
7 transcript marked as Government Exhibit 1 happened in these
8 circumstances. I would listen to that testimony and then I
9 would just take the transcript with me.

10 MR. LAROCHE: That's fine. We can provide that to the
11 Court.

12 THE COURT: So what I am going to do is I am going to
13 plan for two days. So now the question is when do we spend
14 those two days?

15 MR. RETURETA: If I may suggest?

16 THE COURT: Yes.

17 MR. RETURETA: Happening right now, before Judge
18 Crotty, is a case involving two Venezuelan nationals that were
19 participating in an alleged conspiracy involving the Chicheros
20 in Honduras as well as other Honduran officials. That case is
21 producing testimony right now from one of the case agents in
22 our case, the cooperator in our case, and we anticipate the
23 defendants in Chicheros in our case.

24 So as the Court determines a time frame for this, we
25 have a couple of factors that I would ask the Court to take

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1 into consideration. That is, one, that we would like to have
2 the transcript of that testimony to be able to review because
3 it does impact the conduct and operation of that organization
4 in Honduras.

5 THE COURT: So the idea is you may submit some portion
6 of that transcript on your case, so to speak, and you would
7 highlight it or direct my attention to it.

8 Go ahead.

9 MR. RETURETA: The other component is that we have an
10 obligation to try and make one more effort as to safety valve,
11 and we would like to squeeze in another meeting with government
12 counsel to try and see if that can be accomplished.

13 THE COURT: When will the transcript be available?

14 MR. RETURETA: I left Judge Crotty's courtroom this
15 afternoon. One of the cooperators was testifying. They
16 anticipate that the trial will take just short of Thanksgiving.
17 So I anticipate with the holidays, I hope by the end of the
18 year we can get the transcripts.

19 THE COURT: Would it really take that long? I don't
20 really know. I am involved in a long civil case where they are
21 ordering daily copy.

22 MR. LAROCHE: The government will provide copies, and
23 I think we will be able to provide those shortly after
24 Thanksgiving.

25 THE COURT: So early December.

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1 MR. LAROCHE: That's right.

2 THE COURT: What about the safety valve meeting?

3 MR. RETURETA: If we can pull it off before
4 Thanksgiving or shortly after Thanksgiving.

5 MR. LAROCHE: That's fine. We will work with defense
6 counsel and do that as soon as we can.

7 THE COURT: So I am looking at December 20-21. That
8 way we get it done before the holidays; we get it done before
9 January.

10 MR. RETURETA: I am bound by a higher authority, my
11 wife, a family vacation.

12 THE COURT: When are you gone?

13 MR. RETURETA: We are leaving the Saturday.

14 THE COURT: The 17th?

15 MR. RETURETA: Yes. Through the Christmas holiday.

16 THE COURT: So you're basically leaving from the 17th
17 through the end of the month?

18 MR. RETURETA: Actually, family is divided between
19 Florida and New York. We are back here after the Christmas
20 holiday.

21 THE COURT: You mean the week between Christmas and
22 New Year's. We are not around then.

23 Well, then it's problematic. So bear with me just a
24 minute.

25 How about January 18-19, or actually 17-18.

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1 MR. LAROCHE: I am scheduled for a trial that starts
2 that week.

3 THE COURT: How likely is it to go?

4 MR. LAROCHE: It is pretty likely at this point to go.
5 I don't know if the Court is available earlier in the month.

6 THE COURT: I am in trial. I am in trial the week
7 before. I am in trial the week after.

8 MR. LAROCHE: Perhaps sometime in late February, if
9 that works for the Court.

10 THE COURT: It's November now.

11 MR. LAROCHE: Obviously, the government, if the Court
12 wants to schedule it on that date, we will make sure we have
13 someone available to do it. There are other AUSAs on the case.

14 THE COURT: Let's do that then. Just because it seems
15 irresponsible to wait on the sentencing until February, and
16 particularly -- well, I guess it doesn't really matter. Well,
17 I don't know. You tell me. The defendant is incarcerated. I
18 presume that the guidelines one way or the other mean a lot of
19 time, and therefore it's not terribly --

20 MR. RETURETA: I am not in a position to tell the
21 judge the difference between January and February.

22 THE COURT: What I am trying to figure out, let's say
23 there were no enhancements. What is the guidelines
24 recommendation with no enhancements? Your best case is what?

25 MR. RETURETA: Level 38.

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1 THE COURT: So level 35, criminal history category of?

2 MR. RETURETA: I.

3 THE COURT: Is going to be more than one month making
4 a difference. So I could also just say let's not torture us
5 all and make it February, as a practical matter.

6 MR. RETURETA: It's fine with the defense, because of
7 this other case that's happening and what is being produced out
8 of that case. I would like to have more time than less with
9 that. So that's fine with us.

10 THE COURT: So now we are looking at February.

11 Mr. Laroche, what are your commitments in February?

12 MR. LAROCHE: Later in the month would be better. I
13 have another trial on February 6 that should last two weeks
14 that I give less of a chance to go, but as of right now it's
15 still going.

16 THE COURT: Why don't we pick two sets of dates,
17 because I don't have trials scheduled in February at the
18 moment. So let's pick the 7th and 8th. And if that doesn't
19 work, the 28th and the 1st.

20 I will also just warn you that I generally have
21 conferences in the morning so we would probably start late
22 morning, have a latish lunch, and then just keep going through
23 the day. Those would be the hours.

24 MR. LAROCHE: Understood.

25 THE COURT: What I will do is I will issue a

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1 scheduling order just so we have this written down somewhere.
2 It will give alternative dates, and it's understood that if
3 your trial goes forward, then we will just move this.

4 MR. LAROCHE: Thank you, your Honor.

5 THE COURT: Thank you.

6 Have a good evening. Thank you for accommodating my
7 schedule.

8 (Adjourned)